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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 29

SANFORD ZWICKLER,

*Appellant,*

—v.—

AARON E. KOOTA, as District Attorney of the County of Kings,

*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

## BRIEF *AMICUS CURIAE* OF NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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# INDEX


PAGE

Interest of Amicus ..... 1

Argument ..... 2

I. The State Statute Challenged by This Suit Is Vague, Overbroad and Susceptible of Sweeping and Improper Application Trenching Upon Rights of Free Expression ..... 3

II. The Court Below Erred in Abstaining ..... 5

Conclusion ..... 9


## Table of Cases


Anderson v. Martin, 375 U. S. 399 (1964), reversing 206 F. Supp. 700 (E. D. La. 1962) ..... 5, 7

Baggett v. Bullitt, 377 U. S. 360 (1964) ..... 6, 8

Bond v. Floyd, 385 U. S. 116 (1966) ..... 7

Cameron v. Johnson, 262 F. Supp. 873 (S. D. Miss. 1966), on remand from 381 U. S. 741 (1965), appeal pending, O. T. 1967, No. 111 Misc. ..... 6

Dombrowski v. Pfister, 380 U. S. 479 (1965) ..... 5, 7

Evers v. Dwyer, 358 U. S. 202 (1958) ..... 6, 7

Gayle v. Browder, 142 F. Supp. 707 (M. D. Ala. 1956), affirmed *per curiam* 352 U. S. 903 (1956) ..... 5, 6, 7

PAGE

Jacobs v. New York, —— U. S. ——, 18 L. ed. 2d 1294 (1967) ..... 8

Mills v. Alabama, 384 U. S. 214 (1966) ..... 3, 4, 8

Strother v. Thompson, 372 F. 2d 654 (5th Cir. 1967) ..... 2

Talley v. California, 362 U. S. 60 (1960) ..... 3, 4

Tannenbaum v. New York, —— U. S. ——, 18 L. ed. 2d 1300 (1967) ..... 8

Thomas v. Mississippi, 380 U. S. 524 (1965) ..... 2

Zwicker v. Boll, —— F. Supp. ——, W. D. Wisc., No. 67-C-36, decided June 7, 1967, appeal pending, O. T. 1967, No. —— Misc. ..... 6

STATUTES

28 U. S. C. §2283 ..... 6

New York Penal Law, §781-b (McKinney's Consol. Laws, c. 40) ..... 2, 3, 4, 6, 8

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### Interest of *Amicus*

*Amicus* is a New York corporation organized for the purpose, among other things, of securing equality before the law, without regard to race, for all citizens. In this connection, *amicus'* staff attorneys often have represented citizens before various courts, including this Court, on claims that they have been denied equal protection of the laws, due process of law, and other rights secured by the Constitution and laws of the United States. Moreover,

its attorneys have represented citizens who have been denied First Amendment rights while attempting to secure equal treatment before the law without regard to race.

In *Strother* v. *Thompson*, 372 F. 2d 654 (5th Cir. 1967), *amicus'* attorneys represented civil rights workers prosecuted under a Jackson, Mississippi municipal ordinance restricting the distribution of handbills in that city. Having had experience with the pains, perils and prolongations of litigation in the state courts—litigation which in the Jackson Freedom Rider cases alone required delay of four years and expenditure of many thousands of dollars before the vindication of precious constitutional rights in this Court, *Thomas* v. *Mississippi*, 380 U. S. 524 (1965)—*amicus'* attorneys sought and obtained pretrial federal declaratory and injunctive relief against the handbill prosecutions.

Because of the broad significance of this case, which may not adequately appear in argument on behalf of the parties, amicus respectfully submits that its views may be of interest to the Court.

## Argument

*Amicus* submits that the state statute challenged by this suit[1] is on its face offensive to the First and Fourteenth Amendments to the Constitution of the United States and that the court below erred in refusing to so hold.

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[1] Section 781-b of the New York Penal Law, McKinney's Consol. Laws, c. 40.

## I.

## The State Statute Challenged by This Suit Is Vague, Overbroad and Susceptible of Sweeping and Improper Application Trenching Upon Rights of Free Expression.

Appellant unsuccessfully sought below injunctive and declaratory relief against Section 781-b of the New York Penal Law. That statute makes it a crime, among other things, to distribute "in quantity" any anonymous literature concerning any person "in connection with" any election. The court below, one judge dissenting, took no position on the validity of the statute. However, it is plain that §781-b cannot stand consistently with *Talley* v. *California,* 362 U. S. 60 (1960), and *Mills* v. *Alabama,* 384 U. S. 214 (1966).

In *Talley,* the Court invalidated a municipal ordinance making it a crime to distribute anonymous handbills "under any circumstances." The Court reserved the question whether a more limited ordinance—"limited [so as] to prevent [fraud, false advertising, libel] or any other supposed evils" (362 U. S. at 64)—could pass constitutional muster.

The New York statute purports to be more limited than the *Talley* ordinance in two ways. It proscribes distribution of anonymous literature only if the literature is: (1) "in quantity"; and (2) "in connection with" any election. These "limitations" only serve to incorporate impermissible vagueness into the statute and do not cure its overbreadth. As the court below noted (261 F. Supp. at 988), the phrase "in quantity" is not defined. Nor, *amicus* adds, is there a definition of the phrase "in connection with"

any election. The public is required to play "guessing games" (see 261 F. Supp. at 988) as to how proximate in time and content to an election a handbill must be to meet the statutory standard.

But even if §781-b were more limited than the *Talley* ordinance, it would still not be limited enough to meet First Amendment objections.

In *Mills* v. *Alabama*, 384 U. S. 214 (1966), this Court invalidated a state statute which made it a crime to solicit any votes on election day in support of or in opposition to any proposition being voted on that day. The state sought to justify the statute on the ground that its limitation as to time (only one day) and content (only "electioneering") made it reasonable. But the Court rejected this defense, holding (384 U. S. at 220):

> We hold that no test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election.[2]

*Amicus* submits that §781-b cannot escape invalidation under the First Amendment when it makes it a crime for a person to do no more than distribute "in quantity" anonymous handbills "in connection with" a publicly held election.

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[2] The fact that *Mills* involved newspaper publishing rather than handbill distribution has no constitutional significance (384 U. S. at 219):

> The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, see *Lovell* v. *Griffin*, 303 U. S. 444, 82 L. ed. 949, 58 S. Ct. 666, to play an important role in the discussion of public affairs.

## II.

## The Court Below Erred in Abstaining.

The court below, by abstaining, put itself in conflict with several prior decisions of this Court. The court held that appellant should first seek declaratory relief in an appropriate state court (261 F. Supp. at 993). However, in *Anderson* v. *Martin*, 375 U. S. 399 (1964), reversing 206 F. Supp. 700 (E. D. La. 1962) (three-judge court), also a federal suit seeking to restrain the enforcement of a state statute regulating the electoral process, this Court authorized federal injunctive relief. No suggestion was made either in this Court or below that such relief should first have been sought in the appropriate state court, although Louisiana,[3] like New York,[4] has a declaratory judgment procedure. Such a suggestion was, however, made in *Gayle* v. *Browder*, 142 F. Supp. 707 (M. D. Ala. 1956) (three-judge court), *affirmed per curiam*, 352 U. S. 903 (1956), and firmly rejected (142 F. Supp. at 713):

> The short answer is that [comity] has no application where the plaintiffs complain that they are being deprived of constitutional civil rights, for the protection of which the Federal courts have a responsibility as heavy as that which rests on the State courts.

And in *Dombrowski* v. *Pfister*, 380 U. S. 479, 491 (1965), this Court unambiguously held that when a statute broadly overreaching First Amendment freedoms is challenged in a federal court, the *state* must "assume the burden of obtaining a permissible narrow construction in a noncriminal proceeding."

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[3] See *Dombrowski* v. *Pfister*, 380 U. S. 479, 491, footnote 6 (1965).

[4] See 261 F. Supp. at 993.

The court below also appeared to suggest that appellant's federal suit was premature, since appellant was not threatened with imminent arrest (see 261 F. Supp. at 988).[5] But, as this Court has pointed out, one is not required to risk arrest in order to test the validity of a state statute infringing upon his federal rights, *Evers* v. *Dwyer*, 358 U. S. 202, 204 (1958); *Gayle* v. *Browder*, *supra*. Moreover, this suggestion ignored the practical restraints imposed upon appellant by the statute. Appellant had to guess whether he was within the time perimeter described by "in connection with any election." If he guessed "yes", and the state court disagreed, then it could dismiss his declaratory judgment suit by parity of reasoning with the court below.[6] If he wrongly guessed "no", distributed his handbills and was arrested and charged under §781-b, then a federal court might well hold relief barred by comity or 28 U. S. C. §2283. See *Cameron* v. *Johnson*, 262 F. Supp. 873 (S. D. Miss. 1966) (three-judge court), on remand from 381 U. S. 741 (1965), appeal pending, O. T. 1967, No. 111 Misc.; *Zwicker* v. *Boll*, —— F. Supp. ——, W. D. Wisc., No. 67-C-36, decided June 7, 1967 (three-judge court), appeal pending, O. T. 1967, No. —— Misc. In either event, he would be required to wait until shortly before the election to com-

[5] Notwithstanding appellant had previously been arrested and prosecuted under §781-b, the majority thought that appellant's allegation of future arrest and prosecution for the same acts "presume[d] to read [the prosecutor's] mind" (261 F. Supp. at 988).

[6] Moreover, here, as in *Baggett* v. *Bullitt*, 377 U. S. 360, 378 (1964), "it is difficult to see how an abstract construction of the challenged terms . . . in a declaratory judgment action could eliminate the vagueness from these terms. It is fictional to believe that anything less than extensive adjudications, under the impact of a variety of factual situations, would bring the oath within the bounds of permissible constitutional certainty. Abstention does not require this."

mence his suit—with the likelihood that the election would come and go before he could obtain a protective judicial ruling vindicating his plain First Amendment rights.

It is true that *Anderson* v. *Martin, Gayle* v. *Browder* and *Evers* v. *Dwyer* were all equal protection cases rather than First Amendment cases. But that fact cannot diminish the propriety or necessity of federal relief. As this Court stated in *Bond* v. *Floyd,* 385 U. S. 116, 131 (1966):

> We are not persuaded by the state's attempt to distinguish, for purposes of our jurisdiction, between [legislative action] alleged to be on racial grounds and [legislative action] alleged to violate the First Amendment.

The fact that this suit seeks the vindication of First Amendment rights should, if anything, make this a *more* compelling case for federal relief. As this Court held in *Dombrowski* v. *Pfister, supra,* 380 U. S. at 486-87:

> A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms . . . When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. *The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases* . . . The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecu-

tion, unaffected by the prospects of its success or failure. (Emphasis added)

Notwithstanding this Court's clear holding, and appellant's express reliance upon it (261 F. Supp. at 988), the court below brushed it aside, saying (261 F. Supp. at 992): "There is no suggestion . . . that the [appellant's] defense to any such prosecution [under §781-b] will not assure him adequate vindication of his alleged constitutional rights."

Unless this Court reasserts the primacy of its doctrine over that of the district court, First Amendment rights will entail only the right to have one's arrest and conviction for constitutionally protected activity overturned some years later[7]—*not* the right to engage in the protected activity itself. First Amendment rights should be the province not only of law professors but of those persons whose criticisms and clamor "the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free", *Mills* v. *Alabama, supra,* 384 U. S. at 219. As long as §781-b deters this socially vital and constitutionally protected activity, abstention defeats rather than serves a healthy federalism.[8]

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[7] And sometimes not even then, see *Jacobs* v. *New York,* —— U. S. ——, 18 L. ed. 2d 1294 (1967); *Tannenbaum* v. *New York,* —— U. S. ——, 18 L. ed. 2d 1300 (1967).

[8] See *Baggett* v. *Bullitt,* 377 U. S. 360, 378-79 (1964):

> We also cannot ignore that abstention operates to require piecemeal adjudication in many courts, *England* v. *Louisiana State Board of Medical Examiners,* 375 U. S. 411, thereby delaying ultimate adjudication on the merits for an undue length of time, a result quite costly where the vagueness of a statute may inhibit the exercise of First Amendment freedoms. . . . Remitting these litigants to the state courts . . . would further protract these proceedings, . . . with only the likelihood that the case, perhaps years later, will return to the . . . District Court and perhaps this Court for a decision on the identical issue herein decided.

## CONCLUSION

**For the foregoing reasons, the decision below should be reversed.**

Respectfully submitted,

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